

TESTIMONY OF THE MONTANA CHAPTER OF THE SIERRA CLUB  
House Bill 405 by Representative Mike Lange  
House Natural Resources Committee – January 31, 2007

Mr. Chairman, members of the House Natural Resources Committee, for the record my name is Don Judge and I'm here today on behalf of the Montana Chapter of the Sierra Club **in opposition to House Bill 405.**

House Bill 405 represents perhaps the most sweeping realignment of policy, priorities and due process currently before the 2007 Montana Legislature. And from the point of view of the Sierra Club, that realignment is not good for Montana citizens, our natural environment, our air, our water, our wildlife or our future.

House Bill 405 proposes to exempt from the Montana Environmental Policy Act (MEPA) and the Major Facility Siting Act (MFSa) any new energy project or associated supporting infrastructure determined to be a "clean" energy development project. It also proposed to exempt such projects from any local laws or regulations which are deemed "unnecessarily restrictive" but provides not definition for that term, not does it designate who would make such a determination.

At the outset, House Bill 405 states that "*The Legislature finds that:*" Montana's current regulatory process contains "(g) *certain impediments, including transmission and pipeline constraints and overly burdensome and duplicative regulatory constraints, [which] forestall the necessary and timely development of the state's clean energy resources; and (h) [that] it is in the public interest that the legislature, on behalf of all Montanans, remove impediments and facilitate the timely and sustainable development of Montana's clean energy resources for energy and economic security purposes.*"

Frankly, the assumptions made in these statements do not reflect the reality of the current process nor do they represent either the public interest or reflect the views of all Montanans. If they did, there would be no opposition here today.

It appears to us that under HB 405, with the exception of nuclear energy projects, every other form of new generation, transmission, distribution, pipeline, facility, etc would be considered "clean" and exempt from the laws which were put into place to protect the public health, our environment, our wildlife, our natural resources and our economy from the hazards of uncontrolled development. Further, that any challenge to the determination of how "clean" a project is would be subject to an entirely new judicial process which is crafted specifically to benefit developers over the public.

MEPA was adopted in 1971, prior to the adoption of Montana's current Constitution, with support from such diverse groups as the oil and gas industry, the Montana Chamber of Commerce, the Montana Wilderness Society, the Southwestern Miners Association, Montana Stockgrowers and the Montana Sierra Club, among others. It was designed to establish a process whereby Montana can *anticipate* and *prevent* unexamined, unintended and unwanted consequences of development, rather than stumbling into situations or

cumulative crisis where we can only *react* and *mitigate* the consequences. It established a process for public input into such decisions, for review, appeal and adjudication of disputes arising from such participation. It was, and is, the place where ordinary citizens can access and participate in the decisions that affect their lives and those of future generations.

By exempting energy projects and related facilities from review under MPEA and MFSA, HB 405 strikes at the guts of how Montanans moved from an era of unregulated exploitation into one where development would be allowed, but not without significant research, review and projection of how that proposed development would impact Montana's future. One need only to look at the current environmental consequences and taxpayer obligations resulting from decades of unregulated development of mining to know why exempting such a broad range of projects with significant environmental impacts is a bad idea. Cleaning up these past mistakes will cost hundreds of millions of dollars, and the lives and futures lost of thousands of Montanans exposed to toxics, such as those found in Libby can never be replaced.

The damage done by House Bill 405 doesn't end with exclusion of such supposed "clean" energy projects from MEPA and MFSA. It also establishes new barriers to accessing the legal system to resolve disputes over permitting and development. And, it proposes to give advantage to developers over those of ordinary citizens. HB 405 would limit jurisdiction of disputes to the Federal Court system, keeping Montana Courts out of the process. It would require citizens challenging proposed permitting or development to include the applicant in any such appeal and would require them to post a bond for the payment of costs and damages incurred by the permit applicant should the court find in favor of the department or applicant. At the same time, HB 405 specifically exempts the project applicant from posting a bond to cover costs and damages to the citizen(s) filing the appeal, should the court find in favor of those challenging the permit or project.

HB 405 also seeks to provide that Montana Courts have no *"jurisdiction to hear or determine any issue or case or controversy concerning a clean energy development project or to stop or delay the construction, operation, or maintenance of a clean energy development project except to enforce compliance with [sections 1 through 5]"* the project exemption provisions of this bill.

In other words, should a project meeting the definition of "clean" and allowed to operate ultimately be found to be exposing the public to toxics, hazards, life-threatening conditions, and etc. state courts would have no jurisdiction to protect the public.

And, HB 405 tells our cities, towns and counties that even if the clean energy development project is located inside the directly affected government's jurisdiction, it is exempt from any local law or regulation that is "unreasonably restrictive" in view of "factors of cost or economics." Does that mean that requiring a proposed energy project to prevent particulate dissemination on the occupants of a city, if it presents a "factor of cost or economics" to the developer, it can't be enforced? Does it mean that if an energy developer finds it advantageous as a "factor of cost or economics" to run a transmission

line through a city park instead of routing around that the city can't stop it? Does it mean that if a clean energy project wants to access the city's water/sewer systems it can do so without local government regulation.

Although it doesn't address the issue directly, how would HB 405 impact decisions regarding protection of private property rights and eminent domain? After all, in HB 405 the legislature finds that it is in the public interest to remove impediments and facilitate the timely and sustainable development of Montana's clean energy resources for energy and economic security purposes. Does this now become a factor in disputes over project location and eminent domain decisions?

Mr. Chairman, members of the committee, sometimes a proposal can go too far and can leave too many unanswered questions to allow it to continue through the process. We believe that House Bill 405 is one such proposal. It definitely goes too far, and it also leaves too many unanswered questions.

We urge your committee to give House Bill 405 a "do not pass" recommendation.

Thank you for the opportunity to present our thoughts to you.